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In The

Supreme Court of the United States

October Term, 1995

THE OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, ET AL.,

Petitioners,

v.

EDMUND M. MAHERN, TRUSTEE FOR MERCHANTS GRAIN, INCORPORATED,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR AMICUS CURIAE STATES OF CALIFORNIA, ET AL. IN SUPPORT OF PETITIONERS OHIO AGRICULTURAL COMMODITY DEPOSITORS FUND, ET AL.

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QUESTIONS PRESENTED FOR REVIEW

Whether Congress Has the Authority Under Article I of the United States Constitution to Abrogate the States' Eleventh Amendment Immunity?

Whether Congress Has the Authority Under the Bankruptcy Clause, Article I, §8, cl. 4, to Abrogate the States' Eleventh Amendment Immunity?

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I. INTEREST OF THE AMICI CURIAE

This case represents an archetypical violation of the Eleventh Amendment; the holding below transgresses the plain language of the Amendment as well as the "broad constitutional principle of sovereign immunity" embodied therein. *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468, 486 (1987), *quoting Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J. concurring). The resolution of the question presented in this case is of vital importance to all of the amici States.

The Eleventh Amendment to the Constitution states:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Despite the plain language of the Eleventh Amendment, the Seventh Circuit in this case held that under the Bankruptcy Reform Act of 1994, 11 U.S.C. §106(a), a federal court in Indiana had jurisdiction over a suit brought against Ohio by a citizen of Indiana, and that the federal courts could order monetary relief from the Ohio treasury.[1]

The jurisdiction of federal bankruptcy courts over suits against States is an important issue to the amici

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[1] This case involves a suit against the state by a citizen of another state; it matches exactly the literal words of the Amendment, and the judicial gloss of *Hans v. Louisiana*, 134 U.S. 1 (1890) is unnecessary to its decision. Thus, arguments to revisit *Hans* such as that made by petitioners in *Seminole Tribe of Florida v. Florida*, No. 94-12, are inapplicable.

States for several reasons. Bankruptcy is a nationwide and relatively common occurrence. Close to 1 million bankruptcies are filed each year. GAO Rep., Subcomm. on Economic and Commercial Law, Comm. on the Judiciary, H.R., Bankruptcy Administration; Case Receipts Paid to Creditors and Professionals, July 1994, Table 1, p.28 [hereinafter cited as "GAO Rep."]. In contrast, the total number of all other civil and criminal cases filed in federal court is about 276,000 per year. Committee on Long Range Planning, Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts, March 1995, p.18, Table 7. In order to facilitate the resolution of the party's debts, the bankruptcy courts are given wide jurisdiction over both the debtor and its assets wherever they are found throughout the country.

Any State may find itself in Ohio's position given appropriate circumstances. Indeed, several bankruptcy courts have, since 1994, forced States to answer to a federal court under §106(a). *See, Stern v. Massachusetts Alcohol Bev. Control Comm.* (*In re J.F.D. Enterprises*), 183 B.R. 342 (Bankr. Mass., 1995) (Bankruptcy court ordered State to approve the sale of a license to sell alcoholic beverages "free and clear" of any lien or encumbrance; State's immunity "properly abrogated" by §106(a)); *Sparkman v. Florida Dept. of Revenue* (*In re York-Hanover Developments, Inc.*), 181 B.R. 271 (Bankr. E.D. N.C. 1995) (Florida sued for money damages in North Carolina bankruptcy court; Congress had authority to abrogate the States' Eleventh Amendment immunity under §106(a)).

Suits against States in bankruptcy courts are particularly disruptive to State policy, planning and financial stability because, in addition to being completely

unpredictable, such suits can involve large amounts of money. Gross receipts[2] in bankruptcy total about $1 billion a year. GAO Rep., *supra* at pp.1-2, 34. The actual debts that are subject to control by the bankruptcy courts are far higher. Section 106(a) allows several types of claims to be asserted by private parties against States in bankruptcy proceedings, including preference actions under §547 and tax suits under §505 of the Bankruptcy Code. These suits are particularly onerous because State governments, unlike the federal government and other large creditors, do not and cannot have offices and counsel in every jurisdiction. For these reasons, State dignity and sovereignty are at special risk in the bankruptcy setting.

The Seventh Circuit's ruling strikes at the very heart of State sovereignty in that it offends both of the Eleventh Amendment's "twin reasons for being": protection from federal invasion of a State's dignity and fiscal solvency. *Hess v. Port Authority of N.Y. and N.J.*, 115 S.Ct. 394, 400, 404 (1994). The ruling below offends the dignity of the State, because it allows the federal courts to take away the fundamental ability of the State's voters to "exercise their political will to direct state policy." *Hess*, 115 S.Ct. at 402. In 1968, Ohio created the Ohio Agricultural Commodity Depositors Fund ("Fund") in order to indemnify grain depositors who lose money due to the insolvency of commodity handlers. Page's Ohio Revised Code ("O.R.C.") §926.18. In addition, the Ohio legislature provided for licensure of commodity handlers by the State. O.R.C. §926.02.

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[2] "Gross receipts" are the total receipts paid to professionals and to creditors, not the amount of money actually owed.

This case arose when the Director of the Ohio Department of Agriculture, pursuant to the statutory scheme, suspended the license of a commodity holder, Merchants Grain Inc., ("MGI"), recovered funds from MGI, and paid depositors whose grain had been handled by MGI. By requiring Ohio to reimburse these monies to MGI, the Seventh Circuit ruling below allows the federal courts to override the state statutory process, thus disregarding the policy choices of the State voters, and offending the dignity of the sovereign State.

In addition, because the Fund is part of the Ohio State treasury (O.R.C. §926.16(A)), and is expressly backed by the general revenue fund of the State (O.R.C. §926.19(C)), recovery under the Seventh Circuit ruling would be from the Ohio state treasury. Indeed, the Seventh Circuit held that "[t]here can be no doubt in the present case . . . that the State of Ohio is the real party in interest," precisely because the Fund is part of the State treasury. The ruling below therefore also offends the second of the Eleventh Amendment's "reasons for being," protection of the financial solvency of the State treasury. *Hess*, 115 S.Ct. at 404.[3]

Amici States believe that the Seventh Circuit erred as a matter of law in holding that Congress has the power to

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[3] In *Seminole*, the Tribe and the United States as amicus argued extensively for the application of the doctrine announced in *Ex Parte Young*, 209 U.S. 123 (1908). Whatever role the *Ex Parte Young* doctrine may have in *Seminole*, it is irrelevant to this case, which, as the Seventh Circuit noted, involves only retroactive monetary relief from the State treasury, and not prospective injunctive relief against a State official.

abrogate a State's Eleventh Amendment immunity under Article I, §8, cl. 4, or indeed under any portion of Article I.[4]

Congress cannot use its Article I powers to expand Article III jurisdiction to allow States to be subject to suit in federal court, least of all under the Bankruptcy Clause. A decision that Congress has that broad authority under Article I has potentially vast and far-reaching consequences for all States, and amici States are therefore vitally interested in the resolution of this case.

II. REASONS FOR GRANTING THE WRIT

In *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), this Court held that Congress had not effectively abrogated State Eleventh Amendment immunity from suit under the Bankruptcy Act, former 11 U.S.C. §106(c). In October 1994, Congress passed the Bankruptcy Reform Act, which expressly purports retroactively to abrogate the States' Eleventh Amendment immunity, 11 U.S.C. §106(a). The Seventh Circuit's decision upholding §106(a) against Ohio's Eleventh Amendment challenge squarely presents the issue of Congress' power to abrogate State Eleventh Amendment immunity under the Bankruptcy Clause.

The Seventh Circuit relied on this Court's ruling in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which

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[4] To add insult to injury, under the Bankruptcy Reform Act, Congress purported *retroactively* to abrogate the States' Eleventh Amendment immunity, further damaging Ohio's ability to plan for its future and protect its treasury.

four Justices, led by Justice Brennan, stated that Congress had power to abrogate Eleventh Amendment immunity under the Interstate Commerce Clause, four Justices, led by Justice Scalia, stated that Congress did not, and Justice White concurred in Justice Brennan's result but expressly disagreed with his rationale. This case demonstrates the necessity for this Court to revisit *Union Gas*, and overrule or clarify the scope of that ruling.

Amici States urge this Court to hold in this case that Congress does not have the authority to abrogate the States' Eleventh Amendment immunity under any part of Article I, and to revisit and overrule *Union Gas* as part of that holding. At the least, amici States believe that decision must be confined to the Interstate Commerce Clause and should not be extended to grant Congress power to abrogate under any other portion of Article I, including the Bankruptcy Clause.

A. Certiorari Should be Granted to Establish that Congress Does Not Have Authority Under Article I to Abrogate a State's Eleventh Amendment Immunity to Suit in Federal Court.

1. *Union Gas* Must Be Overruled, or at a Minimum, Clarified and Limited.

Amici States agree with Ohio that certiorari should be granted to establish that this Court's decision in *Union Gas* does not stand for the sweeping abrogation principle the Seventh Circuit derived from that decision.

No single theory of Congress' power to abrogate State Eleventh Amendment immunity commanded a majority of the Court in *Union Gas*. The plurality opinion

of Justice Brennan held that the States agreed "in the plan of the convention" to allow the federal government to abrogate Eleventh Amendment immunity when legislating under the Commerce Clause. *Union Gas*, 491 U.S. at 19, *citing Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934) *quoting The Federalist* No. 81, p.657 (A. Hamilton) (H. Dawson ed. 1876). Justice Brennan argued that the States implicitly agreed that Congress' power under the Commerce Clause "would be incomplete" without a damages remedy against the States. *Union Gas*, 491 U.S. at 19.

However, the fifth and deciding vote in *Union Gas* was that of Justice White, who expressly stated he did not agree with Justice Brennan's broad implied waiver theory of abrogation. His discussion explaining his vote indicates only that he believes Congress has the ability to subject States to suit. Justice White's distinction of his views from the plurality casts in doubt the proper definition of the "narrowest ground" for which Union Gas stands. It is unclear, for example, whether Justice White's rationale narrows the scope of the plurality's holding, as suggested by one circuit court,[5] or whether it leads to a

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[5] In *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), the Fifth Circuit concluded that Justice White's rationale in *Union Gas* was the theory advanced in *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184 (1964): that the Federal Government can demand a waiver of State sovereign immunity as a condition to State action under the Commerce Clause. Justice White was in the majority in *Welch*, which overruled *Parden* "to the extent that [it] is inconsistent with the requirement that an abrogation on Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch* at 477. But the *Welch* court declined to consider the validity of the *Parden* holding "that Congress has power to

congruent result on a different theory. Additionally, because it is not clear what "settled rule of law" *Union Gas* established with regard to abrogation under Article I, the case does not command the usual deference as a matter of *stare decisis*.

In any event, as strikingly illustrated by this case, the Courts of Appeal are in the dark as to how to interpret *Union Gas*, and are irreconcilably split as to its scope. The Eleventh Circuit in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), distinguished *Union Gas*, and held that Congress did not have the power to abrogate under the Indian Commerce Clause. The Seventh Circuit in this case, *citing Union Gas*, held that Congress could abrogate under the Bankruptcy Clause. The Fifth Circuit in *Chavez v. Arte Publico Press*, 59 F.3d 539 (5th Cir. 1995), interpreted Justice White's opinion to narrow *Union Gas*, but held that Congress could abrogate under the Copyright and Trademark clauses of Article I. This Court's guidance is clearly needed.

2. Congress Has No Power to Abrogate a State's Eleventh Amendment Immunity Under Any Provision of Article I.

Until *Union Gas*, in every case of waiver of a State's constitutional immunity to suit, this Court has required "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be

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abrogate the States' Eleventh Amendment immunity under the Commerce Clause to the extent that the States are engaged in interstate commerce." *Id.* at 477 n.8.

barred by the Eleventh Amendment." *Atascadero State Hospital v. Scanlon*, 473 U.S 234 at 238, n.1 (1985). A State is deemed to have waived its immunity "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Atascadero*, 473 U.S. at 239-40, *quoting Edelman v. Jordan*, 415 U.S. 651 at 673 (1974), *quoting Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).

There is good reason for such a strong requirement for waiver. "[T]he Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States." *Atascadero* at 238. The States understood the "plan of the convention" to embody a respect for State sovereignty including immunity from suit. It is therefore necessary to require waiver in express and overwhelming terms in order to ensure that this fundamental right is not mistakenly violated.

There is no express waiver in Article I. The plain language of Article I, even those portions in which the States are explicitly mentioned, does not contemplate surrender of sovereign immunity to the Union. There are no express commands to the States in Article I, nor any express declaration of Congress' power to enforce them against the States through the device of private lawsuits. Article I merely enumerates the powers of Congress. Article III defines the jurisdiction of the federal courts to hear and enforce requirements enacted pursuant to the powers enumerated in Article I.

The Court has defined three classes of cases, not implicated here, in which federal jurisdiction is established over the states " 'by consent and delegated authority' as a necessary feature of the formation of a more perfect Union," *Monaco*, 292 U.S. at 328-29: suits between sovereign States, between a State and the United States, and those under the Fourteenth Amendment. *Monaco*, 292 U.S. at 328-330; *Fitzpatrick v. Bitzer*, 427 U.S. 445 at 452-456 (1976). These three categories of waiver are firmly rooted in the structure of the federal system, and necessary to "a more perfect Union."

It is considered necessary for the United States to be able to sue a State in federal court; without it the "permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329, *quoting United States v. Texas*, 143 U.S. 621 (1892). The States must be able to sue each other for the same reason. *Monaco*, 292 U.S. at 328-29.

The Fourteenth Amendment is unique in that it is aimed at the behavior of the States toward their citizens and has an explicit provision giving Congress the power of enforcement. The language of the Amendment indicates that a private right of action in federal court was contemplated, as being the most realistic way to vindicate the rights of citizens against the State which denied them their rights. The legislative history and historical context of the Fourteenth Amendment, adopted in the wake of the Civil War, confirm that it places unique limits on the States' sovereignty in order to continue to hold the Union together.

The language of Article I does not resemble that of the Fourteenth Amendment; it does not speak of the

State's duty to its private citizens, nor of a Congressional power to enforce any behavior by a State toward its citizens. Neither the history of this nation nor the structure of the Constitution support any argument that it is necessary to the survival of the Union to permit suits of States by private citizens in federal court under the various Article I powers.

The theory of abrogation advanced by the Seventh Circuit has no grounding in the text of the Constitution, nor is it necessary to the continued existence of the Union. Accordingly, it has virtually no limits. It would allow Congress to subject States to suits by private individuals in any situation in which one of the broad powers granted in Article I would allow the federal government to legislate directly.

This Court's consistent jurisprudence requiring express and overwhelming indicia of waiver of Eleventh Amendment immunity from a State in its statutes is fundamentally inconsistent with allowing waiver of the same sovereign immunity by mere implication in Article I. Nor is such waiver necessary to the permanence of the Union. To the contrary, "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Atascadero* at 239, n.2.

Indeed, the distinct histories of several specific Article I clauses including the Interstate Commerce Clause and the Bankruptcy Clause, (discussed below), and the Indian Commerce Clause (discussed in *Seminole*, Amicus Curiae brief of California et al. at 15-18) indicate that the

States had no thought of a broad waiver of sovereign immunity encompassing all Article I powers "in the plan of the convention," as the Seventh Circuit would have it.

If waiver of Eleventh Amendment sovereign immunity can be implied from any part of Article I, the power of Congress over the States is virtually limitless. "[I]t contradicts [the Court's] unvarying approach to Article III as setting forth the exclusive catalog of permissible federal-court jurisdiction." *Union Gas*, 491 U.S. at 39 (Scalia, J., concurring in part and dissenting in part).

Amici States therefore respectfully request that the Court grant certiorari in this case in order to overrule or at least clarify *Union Gas*, and restore the proper limits to Article III power, and the proper balance of power between State and federal governments.

B. Certiorari Should be Granted to Establish that Congress Does Not Have Authority Under The Bankruptcy Clause to Abrogate a State's Eleventh Amendment Immunity.

The Seventh Circuit extended the "plan of the convention" waiver theory of the *Union Gas* plurality to this case; yet neither the plain language of the Bankruptcy Clause nor its history countenance any such argument. The Bankruptcy Clause merely gives the Congress power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." The States, as such, are not even mentioned, much less their interaction with each other or with the federal government. A system of uniform laws can and has been established for bankruptcies without the necessity for abrogating the States'

sovereign immunity, and the plain language chosen by the framers does not show that they intended to cede State sovereign power to the United States with regard to bankruptcy laws and courts.

This argument is bolstered by the historical analysis of the Bankruptcy Clause. There is no evidence that the framers actually considered the scope of Congress' power against the State under the Bankruptcy Clause. The Bankruptcy Clause was the subject of very little debate at the time of ratification of the Constitution. Indeed, the subject of bankruptcy was not considered "until a very late date" by the participants. The final recommendation for a bankruptcy clause was adopted with "practically no debate." Charles Warren, Bankruptcy in United States History, (1935) pp.4-5.

There is no tradition of broad federal legislation under the Bankruptcy Clause being generally accepted by the States. To the contrary, national bankruptcy laws had a spotty and troubled history until fairly recent times. No attempt to affect State sovereignty was made until the Reform Act of 1978.

In general, the various bankruptcy acts were passed in reaction to a specific economic crisis, and quickly repealed when the crisis was perceived to be at an end. *See* Lawrence M. Friedman, A History of American Law, 269-270. The first two bankruptcy acts were repealed in haste, and generally disliked. The first law, passed in 1800, was criticized and called "immoral" and "anti-Republican." Friedman, *supra* at 269; Warren, *supra*, pp.21-22. It lasted only two and a half years. Act of Apr. 4, 1800, 2 Stats. 19, repealed Dec. 19, 1803, 2 Stats. 248.

The second law, passed in 1841, also was abolished quickly. Act of Aug. 19, 1841, 5 Stats. 440, repealed Mar. 3, 1843, 5 Stats 614. Yet another law was passed in 1867 "though by the merest hair, and over bitter opposition" in Congress. Friedman, *supra* at 549. This Act also proved a failure, was amended in 1874 in an attempt to ease the criticism, and finally repealed in 1878. Finally, in 1898 a bankruptcy act was passed that survived until 1978, when it was replaced with the current Bankruptcy Reform Act. 30 Stats. 544.

During the periods when there was no bankruptcy law, State insolvency laws took over. There was some controversy as to whether these laws were preempted by the Bankruptcy Clause of the Constitution. Friedman at 274. In 1819, this Court found that they were not, although the State laws could not impair the obligation of contract. *Sturges v. Crowninshield*, 17 U.S.C. (4 Wheat.) 122 (1819). Unlike under the Commerce Clause, there is no "dormant" bankruptcy power over the States; the States can pass, and frequently have passed and enforced State insolvency statutes in the absence of a federal bankruptcy law.

In addition, the Bankruptcy Code itself leaves major issues to States' laws. For example, there are no federal insolvency statutes for insurance companies and 11 U.S.C. §109(b)(2) prohibits them from filing a bankruptcy petition. The result is that Congress has actually required insurance companies to liquidate only under State law. In addition, "property of the estate" is determined by State law. 11 U.S.C. §541; *see Butner v. United States*, 440 U.S. 48, 54 (1979). The Code also allows the States to adopt their own exemption laws. 11 U.S.C. §522(b)(2). The property

of the estate must be managed according to State law. 28 U.S.C. §959(b).

The Commerce Clause, the Article I power at issue in *Union Gas,* has a very different history from that of the Bankruptcy Clause. It reflects a different understanding of the relative powers of the States and the federal government. The Commerce Clause itself was the subject of considerable debate at the time of the Constitutional Convention, and the time of ratification. Indeed, the provision " 'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.' " *Wardair Canada, Inc. v. Florida Dept. of Revenue,* 477 U.S. 1, 7 (1986), *quoting Hughes v. Oklahoma,* 441 U.S. 322, 325-326 (1979); *see also The Federalist* No. 42 (J. Madison), p.7 (J. Cooke ed. 1961). *Oklahoma Tax Commission v. Jefferson Lines, Inc.,* 115 S.Ct. 1331 at 1335-36 (1995).

The breadth and application of the Bankruptcy Clause to the States is also sharply distinguishable from the Commerce Clause powers over the States. As stated in the plurality opinion in *Union Gas*: "[i]t would be difficult to overstate the breadth and depth of the commerce power. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); *Wickard v. Filburn,* 317 U.S. 111, 127-128 (1942); *Katzenbach v. McClung,* 379 U.S. 294 (1964)." *Union Gas,* 491 U.S. at 20. Not only is the power great, but it is unique among all of the constitutional powers, in that it "displaces state authority, even where

Congress has chosen not to act, *see Gibbons v. Ogden*, 9 Wheat. 1 (1824); *Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408 (1925); *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989), and it sometimes precludes state regulation even though existing federal law does not pre-empt it, *see Philadelphia v. New Jersey*, 437 U.S. 617, 621, n.4, 628-629 (1978); *Northwest Central Pipeline Corp., supra.*" *Union Gas*, 491 U.S. at 20.

The historical development of the Bankruptcy Clause, and of federal bankruptcy law also indicates a very different relationship between the States and the federal government with regard to bankruptcy than the relationship with regard to Indian affairs. The Indian Commerce Clause, the Article I power at issue in *Seminole*, was understood from the beginning to shift control over Indian affairs from the States to the United States.

The inability to control trade with the Indians under the Confederation was the impetus for Madison to urge adoption of the Indian Commerce Clause.[6] The subject of trade with the Indians was discussed by Madison in *The Federalist Papers*. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 n.4 (1985), *citing The Federalist* No. 42, p.284 (J. Cooke, ed. 1961). Even before the Constitution,

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[6] However, even before the adoption of the Constitution, some principles had been established regarding the nature of Indian interests in property. No one could purchase Indian land without the consent of the sovereign. *Oneida* at 234. Before the Revolution, the "sovereign" was the Crown. After the Revolution, but before the ratification of the Constitution, there was doubt as to whether the "sovereign" was the individual State or the United States. After the ratification of the Constitution, the "sovereign" became the United States. *Oneida* at 234.

the central government had asserted control over Indian affairs in the Articles of Confederation. Articles of Confederation, art. IX. Despite this, some States argued that there was no federal authority over their power to trade with the Indians. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

Congress took steps to regulate Indian affairs almost immediately after the Constitution was ratified; the first Indian Trade and Intercourse Act was passed in 1790, at the urging of President Washington and the Secretary of War. Ch. 33, 1 Stat. 137. In 1793 a stronger version of the Act was passed. 1 Stat. 330, §8. Under both Acts, no person was allowed to purchase Indian lands unless pursuant to a treaty with the United States. *See, Oneida*, 470 U.S. 226 at 231-232. Numerous cases and statutes since that time have recognized the federal nature of Indian commerce. In contrast to the early and continuous history of federal involvement and control over commerce with the Indians, the federal role in bankruptcy is of relatively recent vintage.

Amici States reassert, without repeating herein, their position that despite the well-settled extent of federal authority over Indians generally, the Indian Commerce Clause does not give power to Congress to abrogate a State's Eleventh Amendment immunity. *See Seminole*, Amicus Curiae brief of California et al. at 15-18. Similarly, as set out above, amici States assert that the Commerce Clause does not give power to Congress to abrogate a State's Eleventh Amendment immunity. *A fortiori*, the plain language, history and jurisprudence of the Bankruptcy Clause presents yet a stronger argument that

States did not cede this authority to Congress in "the plan of the convention."

In *Hoffman*, this Court held that Congress had not sufficiently indicated its intention to abrogate the State's Eleventh Amendment immunity in the Bankruptcy Act. The *Hoffman* Court expressly reserved on the issue of whether Congress has the *power* to abrogate under the Bankruptcy Clause. 492 U.S. at 104. This Court has never determined whether Congress has power to abrogate the States' Eleventh Amendment immunity under the Bankruptcy Clause. While, as noted above, some lower courts have held that §106(a) abrogates Eleventh Amendment immunity and assume that Congress has the power to do so, these holdings are based on what amici States believe is an unwarranted extension of Justice Brennan's opinion in *Union Gas*. Certiorari is warranted to establish that the Bankruptcy Clause does not grant Congress power to abrogate the Eleventh Amendment.

III. CONCLUSION

For all the foregoing reasons, amici States respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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